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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of	)	
	)	
Standardized and Enhanced	)	MM Docket No. 00-168
Disclosure Requirements for	)	
Television Broadcast Licensee	)	
Public Interest Obligations	)	

To: The Commission

JOINT COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

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SUMMARY

Under their respective charters, each State Broadcasters Association has been established to protect and enhance the service and business of the free, local, over-the-air broadcast industry with its borders. Consistent with that common mission, they have caused the *NPRM* to be carefully reviewed by counsel and have concluded that, while certain of the Commission's positions are meritorious, many of its proposals, if adopted, would be unlawful as a matter of either constitutional or statutory administrative law.

By its *NPRM*, the Commission is signaling a return to an earlier regulatory time of formalistic ascertainment procedures, mandatory program logs and "quantitative minimums" for programming. Almost twenty years ago, with the benefit of a strong record in an extensive rule making proceeding, the Commission concluded that broadcasters routinely determine community needs and interests in a variety of ways and that the formalistic process of the then current ascertainment was very costly. Accordingly, the Commission decided to no longer evaluate broadcasters based on the particular method by which they ascertained those needs and interests.

In the same proceeding, the Commission concluded that it "quantitative minimums" renewal processing guidelines, as well as the companion requirement for maintaining program logs served no purpose, created an unjustifiable and significant burden on broadcasters and raised First Amendment concerns.

The Commission's Standardized Programming Form proposal poses the same substantial cost, policy and legal concerns. By selectively favoring certain categories of programming and by requiring television broadcasters to quantify such programming for public and FCC scrutiny, the government is proposing a scheme to censor certain programming speech, to the exclusion of other programming speech, of the nation's television broadcasters. The nature of the form and its contents will mislead the public into believing that certain minimum amounts of certain types of programming are required and therefore they can be expected to complain to the FCC if a station does not, in the opinion of the citizen, carry enough of the government "favored" typed of programming. Such complaints will necessarily require the Commission to decide what is "enough" thereby establishing a de jure or de facto quantitative standard for the industry. The higher the quantitative requirement, the greater the censorship. Even in the absence of a known numerical standard, broadcasters will tend to "chill" their own programming speech by choosing programming, to the exclusion of other programming, that meets or exceeds either (i) some national or local "average" (based on the publicly available data) or (ii) the level achieved in their last Standardized Programming Form for a particular category of programming. In both cases, the overriding goal will, as expected, be to avoid governmental scrutiny and second guessing, rather than the need for the station's programming to be innovative, unique and responsive to the evolving needs and interests of the community.

The Standardized Programming Form will also require, at least implicitly, the maintenance of voluminous station program logs, the very logs which the Commission found in 1984 represented a huge regulatory cost to the industry. This is foreseeable since it is likely that the Commission will insist that stations keep adequate daily log type records so that the data can be verified.

The Commission's proposal for the Standardized Programming Form will inevitably require the Commission to create a formalistic ascertainment process once again. The ascertainment information to be required under that form will be used by members of the public to determine whether particular demographically-related "communities" have been contacted and whether certain programming has been developed for those "communities." Using that information, it is likely that members of the public will complain to the Commission that their "community" was not contacted or that specific programming was not aired to meet their "programming needs." These types of complaints will force the Commission to determine what a "community" is, thereby putting pressure on the Commission to create a national standard of some twenty-one or more community segments, as it did in the past. In turn, the factual questions will include what representative or "leader" of the community was contacted, when, where and by whom.

The proposal of the Commission to require television stations to maintain two sets of public inspection files, one at their studios and a new one on the World Wide Web, is unwarranted and will be enormously costly. Access to the public inspection files of stations is preserved by rule. If access is denied, that becomes an enforcement issue. However, this is no evidence of a general breakdown in enforcement and there is no known public outcry for 24 by 7 access to the file that would justify requiring that the contents of all television station public inspection files be posted on the Internet. Also, based on expert opinion detailed in the Joint Comments, the new proposal will require television stations nationwide to expend hundreds of thousands of dollars in straight typing, scanning and proofing the thousands of pages of information contained in many public inspection files, as well as in web-site design, web-site

redesign, web-site maintenance, all to make the information easily accessible and fully compatible with the needs of the disabled.

In summary, the *NPRM* has the look and feel, as well as foreseeable effect, of a proceeding initiated in the 1960's when regulatory micro-managment was regarded as the only way to regulate in the public interest and government was expected not only to solve all problems but also to create them so that it could take credit solving them. At bottom, this proceeding is a solution in search of a problem.

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To: The Commission

JOINT COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

Alaska Broadcasters Association, Arizona Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Georgia Association of Broadcasters, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/District of Columbia/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters,

South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (each, a "State Association" and collectively, the "State Associations"), by their attorneys, and pursuant to Sections 1.415 and 1.419 of the Commission's Rules and Regulations, 47 C.F.R. § § 1.415, 1.419, hereby jointly comment upon the Commission's above-captioned *Notice of Proposed Rule Making* (the "*NPRM*"), MM Docket No. 00-168.

I. INTRODUCTION

1. Under their respective charters, each State Association has been established to protect and enhance the service and business of the free, local, over-the-air broadcast industry within its borders. Consistent with that common mission, they have caused the *NPRM* to be reviewed by counsel and have concluded that, while certain of the Commission's positions are meritorious, many of its proposals, if adopted, would be unlawful as a matter of either constitutional or statutory administrative law.

2. Under its *NPRM*, the Commission has tentatively proposed the following for analog and DTV television broadcasters:

(a) That such broadcasters gather and categorize detailed programming and other data, complete a lengthy standardized form and place the completed form in their public inspection files, on a quarterly basis. These broadcasters would need to report on the quantity of time they air news casts, local newscasts, public affairs programming, political/civic

discourse programming, programs for under-served communities, public service announcements, locally originated public service announcements, and local programming devoted to local issues that was not reported under any of the aforementioned categories. The standardized form would also require television broadcasters to report how many minutes of free air time they provide federal, state and local candidates before a general election. They would also report whether they sell advertising to state and local candidates before an election. In addition, the standardized form would require such broadcasters to explain their ascertainment procedures. Finally, under the standardized form, the broadcasters would have to report on non-broadcast activities they perform for their communities.

(b) That television broadcasters place in their public inspection files information on what programming was aired with closed captioning and video description.

(c) That television broadcasters create and maintain web sites on which they post, on a quarterly basis, their public inspection files, or as an alternative, that the State Associations create and maintain web-sites on which they post, on a quarterly basis, the public inspection files of their member stations.

(d) That television broadcasters design their own web-sites to meet the World Wide Web Consortium's Web Accessibility Initiative guidelines for making web sites accessible to persons with disabilities.

3. In support of these proposals, the Commission contends that there is a newly discovered need to make it easier for members of the public to access the materials in the public inspection files of television stations and to make the information in such files "easier to understand." The Commission cites to assertions that some individuals have had "difficulties" when seeking to examine the public inspection files of certain stations and that some members of the public find station public inspection files to lack "consistency and uniformity" as a general matter, and particularly as relates to the quarterly "issues/programs lists". The Commission characterizes the issues/programs lists as "an assortment of information which the public may have difficulty determining the extent to which the station is serving the public interest" and speaks approvingly of the standardized form contained at Appendix A of the 1998 Report from the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters. For purposes of these Joint Comments, the form is referred to as the "Standardized Programming Form." The Commission expresses the hope that its new proposals will increase dialogue between the public and stations and lessen the need for Commission involvement. As shown below, sadly the Commission's proposals will likely have the opposite effect since they will have the foreseeable effect of involving the Commission more and more in the areas of ascertainment, record keeping and programming, notwithstanding the fact that, after a searching and careful rule making decision by the Commission years ago, it decided to get out of the "program quantity" business in order to focus on the "issue responsiveness" of stations.

4. The State Associations certainly do not take issue with the general proposition that the Communications Act of 1934, as amended, empowers the Commission to engage in rule making and to adopt a variety of regulations which are in the public interest. However, the public interest standard is just that, a standard which also contains limits on the Commission's

actions. The Commission's conduct is also circumscribed, inter alia, by pertinent provisions of the United States Constitution and the Administrative Procedure Act (the "APA").[1] The following are axiomatic. The Commission may not adopt a rule that constitutes an unlawful abridgement of a broadcaster's Free Speech rights under the Constitution. In addition, every rule making proceeding at the Commission must conform to the requirements of the APA and no rule may be adopted by the Commission that is arbitrary or capricious. In this latter respect, the Commission must ground each action upon a legally adequate record. It must identify and examine the various alternatives, including the option of taking no action. Its selected course of action must be rational. Any time the Commission's proposed action constitutes a substantive change in policy direction away from a long standing policy, the Commission must explain the basis for the change and that basis itself must be rational. For the reasons that follow, the State Associations submit that the proposals of the Commission suffer from one or more legal infirmities that bar their final adoption.

II. DISCUSSION

5. The Commission's proposed actions under the *NPRM* signal a deliberate intent to return to a long ago discredited regulatory time of formalistic ascertainment procedures, voluminous, mandatory program logs, and innovation chilling "quantitative minimum" programming standards. In the past, the Commission required broadcasters to employ formalistic "community needs and issues" ascertainment procedures and to maintain vast quantities of detailed program logs to evidence how much time a station devoted to certain categories of programming. These requirements, despite the certain risk of homogenizing the programming fare of the entire broadcast industry, involved the Commission in examining a

[1] *See* Administrative Procedure Act, 5 U.S.C. § 706(2) (1994).

station's programming judgments through the use of renewal application program-related "processing guidelines." Those processing guidelines meant that a broadcaster would be subjected to rigorous review at license renewal time if the station's "composite week" program logs showed that the broadcaster had aired "less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment programming." *Report and Order, The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 ¶ 5 (1984) (hereinafter "*Report and Order*").

6. In 1984, the Commission reviewed those policies and found that the formalistic ascertainment procedures, mandatory program logs and programming minimums were not justified and indeed created significant program-related legal issues. The Commission explained that the "costs incident to technical compliance and record keeping are inappropriate" and that the "regulatory structure raise[d] potential First Amendment concerns" which were "exacerbated by the lack of direct nexus between a quantitative approach and licensee performance." *Id.* ¶ ¶ 26-27. In addition, the Commission pointed out that "Congress intended private broadcasting to develop with the widest journalistic freedom consistent with its public interest obligation." *Id.* ¶ 27.

7. In reaching its decision to drop the requirements for formalistic ascertainment efforts, the Commission explained that the possible benefits to the public were not justified by the substantial costs incurred by broadcasters. *See id.* ¶ ¶ 48-54. At that time, the Commission found that eliminating formal ascertainment requirements would "result in annual savings of 66,956 work hours to the industry," which translated into monetary savings of between $2,425 to $8,986 per broadcaster. *Id.* ¶ 51. The Commission also recognized that

broadcasters "become and remain aware of the important issues and interests in their communities for reasons wholly independent of ascertainment requirements, and that our existing procedures are, therefore, neither necessary nor, in view of their significant costs, appropriate." *Id.* ¶ 48. Accordingly, the Commission concluded that broadcasters would no longer be assessed by the particular methods through which they ascertain the issues that are important to their communities. *See id.* ¶ 54.

8. Likewise, the Commission found that its "quantitative minimums" renewal processing guidelines, as well as its companion requirement for maintaining voluminous quantities of detailed program logs, served no purpose and created an unjustifiable and significant burden on broadcasters. *See id.* ¶ 69, 74. With respect to the program log requirement, the Commission cited to a GAO Report finding that the requirement for program logs "constituted the largest government burden on business in terms of total burden hours." *Id.* ¶ 69. By the Commission's own calculations at that time, the program logs burdened broadcasters over 2,468,000 hours per year. *See id.* The Commission stated that these costs were "significant" and "inappropriate," and that the "traditional policy objectives with respect to programming have never been fulfilled by the presentation of mere quantities of specific programming." *Id.* ¶ ¶ 26, 29. As a result of its findings, the Commission concluded that "the issues/programs lists is a more useful vehicle to record a licensee's effort" to serve the public interest by airing issue-responsive programming. *See id.* ¶ 75.

9. The Commission also found that its "quantitative minimums" programming standard adversely impacted the broadcaster's freedom of program choice and overall program diversity. For example, the Commission recognized that, as the number of "video outlets increases," broadcasters, "in response to economic incentives," may direct their programming

"toward a narrower audience," – a trend which the Commission sought to encourage. *Id.* ¶ 34. The Commission observed that reliance upon the marketplace, rather than on formalistic programming minimums, would "foster this development by allowing the licensee to consider the programming of other television stations in its market in fulfilling its programming responsibilities." *Id.*

10. The Commission's decision in 1976 to remove itself from approving or disapproving radio format changes underscores the appropriateness and lasting validity of the Commission's 1984 policy decisions in the areas of ascertainment and programming. *See FCC v. WNCN Listener's Guild,* 450 U.S. 582 (1981). In reviewing the Commission's decision to no longer regulate changes in formats, the court noted that "the Commission believes that Government intervention is likely to deter innovative programming." *Id.* at 595. The Commission was "convinced that the market, although imperfect, would serve the public interest as well or better by responding quickly to changing preferences and by inviting experimentation with new types of programming." *Id.* at 601.

11. For the reasons stated below, it is clear that the Commission's proposals constitute a distinct reversal in direction and a return to a prior discredited regulatory time of formalistic ascertainment procedures, mandatory program logs and "quantitative minimums" for programming. Thus, these proposals raise the same compelling legal and policy concerns that persuaded the Commission to jettison those requirements almost twenty years ago.

A. THE PROPOSED REGULATION REQUIRING BROADCASTERS TO GATHER, CATEGORIZE AND DISCLOSE DETAILED PROGRAMMING DATA WOULD VIOLATE THE FIRST AMENDMENT AND WOULD OTHERWISE BE UNLAWFUL AS AN ARBITRARY AND CAPRICIOUS ACT

1. Adoption Of The Standardized Programming Form Proposal Would Contravene The First Amendment

12. While the Commission has the authority to regulate broadcasters in the public interest, *see id.* at 594, the Communications Act "prohibits the Commission from exercising the power of censorship." *Nat'l Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (citing 47 U.S.C. § 326).[2] When the FCC requires its regulatees to compile and publicly disclose data on certain types of programming, but not on other types of programming, the government has placed itself in the position of favoring certain programming over, and to the exclusion of, other programming. As a result, the government is essentially selecting what content is aired by broadcasters. In order to impose a content-based regulation on speech, the Commission must have a compelling reason and the regulation must be narrowly tailored to satisfy that compelling reason. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 118 (1991).

13. In addition to being an impermissible content-based regulation, the government's act to identify certain types of programming for potential governmental scrutiny chills speech in violation of the First Amendment. Finding that a regulation chills speech turns not on whether the Commission actually penalizes a broadcaster for its programming choices, but rather on

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[2] 47 U.S.C. § 326 provides that the Commission lacks "the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." Although 47 U.S.C. § 326 specifically identifies radio communications, the statute is applied to prohibiting the Commission from censoring television broadcast stations. *See, e.g., Nat'l Black Media Coalition v. FCC*, 589 F.2d 578, 581 (1978).

whether the broadcaster will censor itself "to avoid official pressure and regulation." *Cmty.-Serv. Broad. Of Mid-America, Inc. v. FCC*, 593 F2d 1102, 1116 (D.C. Cir. 1978). These pressures can take on "subtle forms." *Id.* "To the extent that a recording requirement" restricts a broadcaster's programming discretion, "it will be effecting a new and significant diminution in the broadcasters' First Amendment freedoms." *Id.* at 1117.

> "Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern."

Id. at 1118.

14. There are grave constitutional free speech problems with the Commission's Standardized Programming Form proposal. While the Commission does not even address the First Amendment implications of its standardized form proposal, clearly the proposed regulation is not narrowly tailored to achieve a compelling end. The Commission is essentially taking the position that it is justified in creating categories of governmentally favored programming because (i) stations are required to air programming responsive to community needs and issues, (ii) the Commission and members of the public have the right to monitor such performance, (iii) and that the quarterly issues/program lists contain "an assortment of information" that does not aid someone who wants to know if a station has complied with the station's obligation to air issue-responsive programming.

15. There should be no genuine dispute that the newly proposed Standardized Programming Form is in fact a reincarnation of the Commission's long ago discredited program log and "quantitative minimum" requirements. That proposed regulation will require television stations to gather and categorize program data, and to use that data to complete a standardized form which will be placed in their public inspection files and posted on the World Wide Web.

Such requirement will recreate the implicit requirement that stations maintain the very same program logs that the Commission ruled so many years ago should no longer be required. Those logs, or other comparable record keeping, will be necessary to allow the Commission to verify the data contained in the Standardized Programming Form. The Standardized Progamming Form will also lead to de jure or de facto "quantitative minimums" for programming. Obviously, if the data is to be generated for public review and monitoring, this creates the likelihood that such data will be used as the basis for complaints, petitions or objections filed with the Commission against stations by members of the public. Each complaint, petition, or objection filed will place the Commission in the position of having to rule on the merits of a variety of programming-related claims such as, for example, whether a particular station is not carrying enough of a certain type of programming. Given the likelihood of that type of claim, and the Commission's need to resolve it, it is inevitable that the Commission will have to resort to some quantitative measure of programming adequacy such as national or local "averages" or the programming "minimums" that the Commission eschewed so long ago for constitutional and other reasons. The threat of the government measuring broadcast stations against certain "averages" or "quantitative minimums" will pressure television broadcasters to carry certain amounts of particular types of programming, to the exclusion of other types, to avoid or at least reduce the risk of governmental scrutiny. *See Cmty.-Serv. Broad. of Mid-American, Inc.* 593 F.2d at 1116.

16. In the *NPRM*, the Commission asserts that the Standardized Programming Form will allow the public to monitor a broadcaster's "programming choices" so as to ensure that the broadcaster is meeting its obligation to serve the community's needs. Although this appears benign on the surface, the mere requirement of the form will chill speech. The Standardized

Programming Form will create for each television broadcaster a "performance floor" since the broadcaster will feel pressure to meet or exceed the levels set forth for each program category in its last most recent standardized form, regardless of the shifting needs of their communities and the availability of other programming outlets, all to avoid having to justify later to the government why the station's quantitative performance in one or more categories fell. The performance floor aspect of the form thereby chills the broadcaster's overall programming discretion.

17. The Standardized Programming Form proposal may not be adopted because the concept of express or implicit quantitative programming minimums is abhorrent under principles of First Amendment law and the 1934 Communications Act in several different respects. The Commission has previously concluded that a station has wide discretion in determining how best to respond to community needs and issues in its overall programming, and that a station may take into consideration the programming of others in the same community. As the number of "video outlets increases," broadcasters, "in response to economic incentives," may direct their programming "towards a narrower audience." *Report and Order*, 98 FCC 2d ¶ 34. The Commission has also asserted that quantitative standards deny broadcasters discretion and do not assure quality programming. *See Nat'l Black Media Coalition*, 589 F.2d at 580. In fact, in the past, the Commission asserted that granting broadcasters greater discretion would further benefit the community by allowing broadcasters to change programming as the needs of their community change. *See Memorandum Opinion and Order, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 104 FCC 2d 358 ¶ 2 (1986) (hereinafter "*Memorandum Opinion and Order*"). Also, the standardized form process, which will pressure stations

nationwide to at least maintain certain quantitative minimums, will not permit a television broadcaster, when deciding what programming types to air, to take into consideration the programming of other broadcasters in the same community. The pressure toward program category and quantitative homogenization frustrate broadcasters in their efforts to innovate and to provide varied programming, including issue-responsive programming. Thus, each community and the nation will be denied the fullest opportunity for a true diversity of programming choices.

18. The Commission has not put forth a compelling need for restricting speech as a result of the proposed standardized form. When explaining its decision to no longer regulate changes in formats, the Commission asserted that "the existence of the obligation to continue service . . . inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications." *WNCN Listeners Guild*, 450 U.S. at 590 n.15 (*quoting* an FCC *Memorandum Opinion and Order*, 60 FCC 2d 858, 865 (1976)). Furthermore, when the Commission eliminated regulation in the form of quantitative minimums and program logs, it stated that "the regulatory structure raises potential First Amendment concerns" that "are exacerbated by the lack of direct nexus between a quantitative approach and licensee performance." *Report and Order*, 98 FCC 2d ¶ 27.

19. The Commission's standardized programming form proposal is not narrowly tailored to meet a compelling need. The categorization of programs and quantitative minimums is not a regulation that is narrowly tailored to determine whether stations are responding to community issues and needs. The Commission has previously concluded that the types of programming carried, and the amount of such programming, are not factors that are necessarily

determinative, or even necessarily indicative, of whether a station is airing enough programming responsive to community needs and issues. On the other hand, the currently required quarterly issues/programs lists do constitute targeted and probative "evidence" of whether a station is doing a satisfactory job responding to community needs and issues. The lists are community need/issue focused and describe in detail what programming was aired to respond to each need/issue. It does not take a rocket scientist to determine whether, in the opinion of a particular member of the public, an important need or issue has been missed altogether or that too little airtime was devoted to an issue that was not only important but raged for weeks or months on end. The Commission long ago concluded, with the benefit of an extensive rule making record, that "the issues/programs list is a more useful vehicle to record a licensee's effort" to provide issue-responsive programming. *Id.* ¶ ¶ 74-75. That those lists may vary in content from station to station is evidence of the individuality of each station, not evidence of the inadequacy of the reporting scheme. If the Commission is truly concerned that the public does not understand what the quarterly issues/programs lists are intended to show, a narrowly tailored response by the Commission would be to require stations to maintain a cover sheet for each quarterly report that offers the following explanation:

> Attached hereto is the Quarterly Issues Programs List for Station ___. The listing identifies the needs and issues of the Station's community of license which the station found warranted the most significant treatment during the previous three months. Stations are required to air programming responsive to the evolving needs and issues of their respective communities of license. In fulfilling this obligation, stations have wide discretion to choose what needs and issues to address and what types of programming they will employ to fulfill this obligation. The needs and issues identified in this listing is not necessarily inclusive of all the needs and issues responded to by the Station during the period. In the event that you do not see listed a particular need or issue that you believe should have been addressed by the station during the period covered by the listing or that you believe a particular matter deserved added coverage by the station during the period, you are encouraged to raise the matter in person or over the telephone

with station management or to fax or e-mail your question to the station. The station's contact information is as follows: _____.

20. Based on the foregoing, the Commission's proposal to scrap quarterly issues/program lists and replace them with the Standardized Programming Form is legally barred under the United States Constitution.

2. The Standardized Programming Form Proposal, If Adopted, Would Be Arbitrary and Capricious

21. The State Associations believe that it would also be unlawful, as an arbitrary and capricious act, for the Commission to adopt its proposed standardized form requirement. Section 706(2) of the APA provides that it is unlawful for an agency to act in an "arbitrary and capricious" manner. *See* Administrative Procedure Act, 5 U.S.C. § 706(2) (1994). Before finalizing a decision, an agency first must consider all the relevant factors, look at the alternatives, and articulate a rational reason for the decision. *See, e.g., Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Fresno Mobile Radio Inc. v. FCC*, 165 F.3d 965, 968 (D.C. Cir. 1999); *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984). The agency's explanation for its decision "must minimally contain 'a rational connection between the facts found and the choice made.'" *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404-05 (D.C. Cir. 1995) (quoting *State Farm Mut. Auto Ins. Co.*, 463 U.S. at 43). An agency's action will be found arbitrary and capricious when it merely states the facts and conclusions without providing a rational connection. *See id.* at 1407. Furthermore, once an agency establishes a policy, an "irrational departure from that policy" will be deemed arbitrary and capricious. *Immigration and Naturalization Serv. v. Yang*, 519 U.S. 26, 32 (1996). The Commission must provide an explanation before departing from precedent. *See Orion Communications Ltd. v. FCC*, 131 F.3d 176, 181 (D.C. Cir. 1977). "An

agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not just casually ignored." *Comm. For Cmty. Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984).

22. It is clear from the earlier discussion that, if the Commission were to adopt its standardized form proposal, such action would result in a de facto reversal of a Commission policy that has been in place for almost twenty years. When eliminating the program guidelines in 1984, the Commission found that it was "no longer interested in the amounts of programming in categories such as 'news' and 'public affairs.'" *Report and Order*, 98 FCC 2d ¶ 74. The Commission determined that the public could easily obtain the information it needs through newspapers and magazine entertainment guidelines. *See id.* ¶ 78. Moreover, the Commission concluded that the information "no longer serves any regulatory purpose," and "the issues/programs list is a more useful vehicle to record a licensee's effort" to provide issue-responsive programming. *Id.* ¶ ¶ 74-75. In addition, the Commission has held that market incentives would ensure broadcasters meet the needs of their community. *See Memorandum Opinion and Order*, 104 FCC 2d ¶ 2. When explaining its decision to no longer regulate changes in formats, the Commission asserted that it was "convinced that the market, although imperfect, would serve the public interest as well or better by responding quickly to changing preferences and by inviting experimentation with new types of programs." *WNCN Listener's Guild*, 450 U.S. at 601. Thus, according to the Commission's prior policy statements, the standardized form will disserve the public interest because each community will receive less, not more, issue-responsive programming.

23. Not only has the Commission failed to explain its reversal in policy, it has not even offered a rational basis for its proposed action. As explained above, the core responsibility

of a broadcaster is to air programming responsive to community needs and interests. There is no rational nexus between the standardized form and the broadcaster's public interest obligation. If the public does not understand what it is looking at, or looking for, when it reviews the quarterly issues/programs lists, the most logical course of action is to better inform the public what the lists represent and why they exist. Also, the lack of access to a station's public inspection file has nothing to do with the adequacy of these lists. If access is the issue, the appropriate remedy is enforcement, not the radicalization of a process that has served the public well for almost twenty years.

24. The Commission's assertion that the quarterly issues/programs lists provide too much information for the public to glean whether the broadcaster is serving the public interest is not rational given that, under the Standardized Programming Form proposal, much more information, including numerous exhibits, will be provided to those same members of the public. Most of that information, for the reasons already explained, has nothing to do with truly measuring a station's responsiveness to community needs and issues. Thus, the nature of the form will in fact mislead the public and thereby cause this misled public to involve the Commission more and more in the programming decisions of television broadcasters, rather than less as expressly hoped by the Commission.

25. The ascertainment showing required under the proposed Standardized Programming Form will pressure the Commission to re-institute the formalistic ascertainment requirements of long ago, for no valid reason. For almost twenty years, the broadcaster's public interest responsibility has been focused on addressing the significant unmet needs, interests and issues of the overall community served by the broadcaster. However, the form cited with approval by the Commission in this proceeding will require television broadcasters to report how

many hours of "programming" they have devoted to "underserved communities," as distinguished from the entire community's needs and issues. This new requirement will require all stations to be all things to all people. The likelihood of this result is apparent from the type of data the Commission is proposing that stations gather, categorize and disclose. For example, if a member of the public does not see, based on the data contained in a particular station's Standardized Programming Form, that his or her demographically defined "community" is being served with programming specifically developed for it, or if that person does not see his or her demographically defined community mentioned among the groups contacted, that person will be able to complain to the Commission that the station's ascertainment efforts were legally inadequate. In that event, the burden will be on the station to respond and explain its why it did not, if it did not, contact the complainant's "community," or why it did not program for that particular "community." If the Commission disagrees with broadcasters that certain "communities" have not been contacted or that the "programming needs" of certain "communities" have not been met, the Commission will find itself having to determine which "communities" every station *in the nation* must separately and routinely ascertain, thereby placing itself on the road to recreating the discredited formalistic, twenty-one ascertainment categories of old.

B. It Would Be Arbitrary and Capricious to Require Broadcasters to Place Data on Their Past Closed Captioned Programming in Their Public Inspection Files

26. The Commission is proposing to create a new category of documents to be included in every television station's public inspection file – namely, information identifying the programming aired by station which is closed captioned. This proposed requirement is unsupported by any need of the consumer. Such consumers should be interested in knowing what future programs are closed captioned. Under the Commission's proposal, the contents of

the public inspection files would only reflect a broadcaster's past programming. In addition, members of the public may obtain that prospective information from local television programming guides.

C. THE PROPOSED REGULATION REQUIRING BROADCASTERS TO POST ON THE WORLD WIDE WEB THE COMPLETE CONTENTS OF THEIR PUBLIC INSPECTION FILES, INCLUDING THE PROPOSED EXTENSIVE PROGRAMMING DATA, WOULD BE ARBITRARY AND CAPRICIOUS

27. The State Associations have already shown why the Commission is legally barred from adopting its Standardized Programming Form. Whether or not that form, with exhibits, is part of a television station's public inspection file, the State Associations submit that it would be arbitrary and capricious, and therefore unlawful, for the Commission to require that the complete contents of that public inspection file be posted on the World Wide Web. Such a requirement would needlessly impose a substantial burden on broadcasters for no valid reason.

28. Broadcasters are currently required to maintain, in their publicly accessible public inspection files, in addition to their quarterly issues/programs lists, "applications, authorizations, citizens agreements, service contour maps, ownership reports, annual employment reports, written correspondence with the public on station operations, material related to Commission investigations or complaints . . . certification that the licensee is complying with its requirements for local public notice announcements . . . political files . . . records regarding compliance with commercial limits on children's programming, and Children's Television Programming Reports." *NPRM* ¶ 14. The *NPRM* proposes that, except for the issues/programs lists, broadcasters will be required to continue to maintain all the information listed above in their public inspection files, while adding the standardized form plus the seven to eight accompanying exhibits.

29. Not only is there no legally supportable basis in the record to require a duplicate set of public inspection files, one to be maintained at each station's main studio, and another to be maintained on the World Wide Web, any requirement that such files be posted on the web will place an extraordinary burden on broadcasters. As shown, the current regulations already require broadcasters to maintain massive quantities of paper in their files. One broadcaster in Maine reported that, excluding the station's political files, its public inspection files now contain 2,255 sheets of paper. Even if the quarterly issues/programs lists are replaced with the quarterly standardized programming disclosure form with its seven to eight exhibits, this will likely result in a net increase in paper, to say nothing of the fact that the quarterly effort to create those new documents will require the expenditure of hundreds of hours of work per broadcaster each year, in gathering the data, collating the data and in-putting the final data on the form and in the exhibits. The standardized form, under the guise of being merely two sheets of paper, actually is the equivalent of nine new filings. Aside from the category for newscasts, each of the other categories requires an exhibit. Each section, therefore, is essentially a separate work effort, with all the categories merely sharing the same cover sheet. In addition, unlike the issues/programs lists which can be routinely written by staff, the eight categories requiring exhibits will require management hours, a factor which the Commission found relevant years ago when it got out of the program quantity business. *See Report and Order*, 98 FCC 2d ¶ 73.

30. Requiring broadcasters to post all the contents in their public inspection files on the World Wide Web, whether on their own web-sites or on the web-sites of their State Associations, will further substantially increase the burden on broadcasters. To accommodate such a requirement, the two-thirds of broadcasters in the top 100 markets that already have web-sites will have to redesign and significantly increase the capabilities of their web-sites. While

every state broadcasters association would want to help its members comply with any new requirement in this area, such an effort would itself place an enormous strain on the personnel and resources of those associations that to accommodate their broadcasters which do not have their own web-sites.

32. The State Associations contacted Dave Biondi at Broadcast Net to better understand what would be entailed in establishing, designing and upgrading web-sites to accommodate the Commission's new proposals. See his Declaration which is attached hereto as *Exhibit A*. Through his company, Mr. Biondi has developed and maintains the web-sites of the Broadcast Executive Directors Association and of numerous other state broadcasters associations and others. He has estimated that it would take a professional listserver, at $65 per hour, approximately 15 minutes to 1½ hours, per page, to complete the process of posting each sheet of paper contained in a broadcast station's public inspection files on the website

33. Specifically, to comply with the proposed posting regulation, a broadcaster will need to hire a web-site designer to design, or re-design as the case may be, a web-site so that can be easily navigated and can accommodate the vast amount of documentation that exists in the typical public inspection file. In addition, to make its web-site fully accessible to persons with disabilities, a broadcaster would have to spend even more time and expense. At an average charge of $65 per hour, Mr. Biondi estimates that it would take 2 ½ to 3 times longer to make a website disability friendly, and it will take 20 minutes to 6 hours, per page, to post the information on such a website. In addition, Mr. Biondi estimates that it would cost each broadcaster approximately between $30 and $50 a month for the additional web-site space needed to store all this documentation. If one were to multiply these costs by the 1,668 full power television stations that are currently licensed, and the number of low power television

stations that will be granted Class A television status, it should be clear to the Commission that any mandatory posting requirement will impose an overwhelming burden on the television broadcast industry at the worst possible time, when the industry's resources are being directed to implementation of the enormously expensive and risky new DTV service.

34. Weighed against these facts is the fact that the public inspection files of stations are routinely accessible to members of their community. Anyone can view the public inspection files at a station's main studio during regular business hours. Where such access is impeded, the situation should be brought to the Commission's attention immediately. The State Associations know of no public outcry for a 24 hour a day right of inspection. Accordingly, the Commission has failed to show that the public desires, much less needs, access to a broadcaster's public inspection files during other than normal business hours.

III. CONCLUSION

Based on the foregoing, the State Broadcasters Associations respectfully urge the Commission to adopt the positions advanced by them in these Joint Comments.

Respectfully Submitted,

The Named State Broadcasters Associations

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